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JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1956

No. 343

W. A. GAYLE, CLYDE SELLERS, and FRANK PARKS, individually, and as members of the Board of Commissioners, of the City of Montgomery, Alabama, and GOODWYN J. RUPPENTHAL, individually, and as Chief of Police of the City of Montgomery, Alabama, and the MONTGOMERY CITY LINES, INC., a Corporation, and JAMES F. BLAKE and ROBERT CLEERE, and C. C. (Jack) OWEN, JIMMY HITCHCOCK, and SIBYL POOLE, as members of the ALABAMA PUBLIC SERVICE COMMISSION,

Appellants.

v.

AURELIA S. BROWDER, and SUSIE McDONALD, and CLAUDETTE COLVIN, by Q. Colvin, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Appellees.

On Appeal From the United States District Court for the Middle District of Alabama, Northern Division

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment and decree of the court below be affirmed on the ground that the questions raised in this appeal are without substance in law and in fact, and that the judgment of the court below is clearly correct in that it accords with this Court's interpretation of the meaning and scope of equal protection and due process of law.

Statement

Appellees are American citizens of Negro origin and are residents of Montgomery, Alabama. Solely because of their race and color, they and other Negroes who use public transportation facilities operating within the City of Montgomery have been forced to submit to discriminatory treatment in the use of these facilities pursuant to state statutes and ordinances requiring the segregation of Negro and white passengers on public transportation facilities within the state. The statutes and ordinances in question are Section 301 (31a, 31b and 31c), Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery.

Appellees instituted the action below seeking to enjoin the enforcement of the state's policy, as evidenced by the statutes and ordinances heretofore cited, by appellants on the ground that racial segregation in the use of transportation facilities constituted an infringement of rights secured under the equal protection and due process clauses of the Fourteenth Amendment.

Appellants, the Board of Commissioners of the City of Montgomery and members thereof, the Chief of Police and the Montgomery City Lines conceded in answer to the complaint that they enforce the segregation of the races on the Montgomery City Lines pursuant to state law. Appellants, the Alabama Public Service Commission and members thereof, submitted that they have no authority to enforce segregation on said lines, but it is conceded that the Chairman of said Commission, C. C. (Jack) Owen, one of the appellants here, did seek to assert such authority.

On April 23 past, this Court dismissed the appeal in *South Carolina Gas & Electric Co.* v. *Flemming*, 351 U. S. 901. The Montgomery City Lines, Inc., interpreted that decision as barring the segregation of passengers in intra-

state commerce and announced that it would no longer enforce segregation over its lines. On April 24, appellant, C. C. (Jack) Owen, as President of the Alabama Public Service Commission, sent a telegram to the National City Bus Lines of Chicago, of which the Montgomery City Lines, Inc. is a subsidiary, and to other operators of bus companies in Alabama, directing them "to strictly adhere to all present existing segregation laws in our state or suffer the consequences."

The court below found the statutes and ordinances in question unconstitutional and void and enjoined their enforcement on the ground that they violated the requirements of the equal protection and due process clauses of the law. Execution of the injunction, however, was stayed pending the filing of an appeal to this Court.

Argument

1. The issue in this case is whether the state policy of Alabama, as set forth in Section 301 (31a, 31b and 31c), Title 48, Code of Alabama 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, requiring the segregation of the races in public transportation conforms to requirements of the Fourteenth Amendment to the Constitution of the United States. The doctrine that the federal courts will not interfere to enjoin state criminal prosecution asserted by appellants, the Board of Commissioners, et al., citing *Douglass* v. *Jeannette*, 319 U. S. 157, is not applicable here. Appellees did not seek to enjoin the enforcement of a criminal prosecution as was the case in *Douglass* v. *Jeannette*. All appellees have been subjected to embarrassment and humiliation in the enforcement of the state law and some have been jailed and convicted for violation thereof. Appellees, however, did not seek to enjoin prosecution of any sort. Nor did they assert or seek to assert that the state could be enjoined from prose-

cuting persons for a violation of its laws. Appellees merely sought a declaratory judgment that the state policy was unconstitutional and an injunction barring its enforcement. As such, appellees were doing merely what had been held to be appropriate in a long line of cases rendered by this Court. See *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education*, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 189; *Cleveland* v. *United States*, 323 U. S. 329.

The questions raised in this case are not such as to warrant a federal court withholding jurisdiction on the ground that the questions involved are of such peculiar local concern that they should be left to determination of the state courts. The extent to which the equal protection and due process clauses of the Fourteenth Amendment restrict state power to regulate public facilities so as to impose distinctions based upon race is a question of national concern which must ultimately be determined by this Court. And there has been shown here no peculiar local circumstances which would warrant a federal court, once its jurisdiction had been properly invoked as here, in holding that a state court is more equipped to settle that question. Certainly this is no greater question of local concern raised here than was present in *Brown* v. *Board of Education*, supra; *McLaurin* v. *Oklahoma State Regents*, supra; *Smith* v. *Allwright*, 321 U. S. 649; *Mayor & City of Baltimore, et al.* v. *Dawson*, 350 U. S. 877; or *Holmes* v. *City of Atlanta*, 350 U. S. 879.

The Alabama Public Service Commission asserts that the Public Service Commission has never attempted to enforce the statutes and ordinances relating to segregation of the races on buses operated by the Montgomery City Lines, and that the Motor Carriers Act specifically does not apply to motor vehicles for hire while operating wholly within the limitations of a city or incorporated town or within the

police jurisdiction thereof. The court below, we submit, answered that objection completely when it said:

> The members of the Alabama Public Service Commission object to their joinder as parties defendant and move to dismiss the action as against them because they say that neither they nor the Commission have any jurisdiction over the buses which are being operated within the City of Montgomery and its police jurisdiction.
>
> In the Act approved July 6, 1945, General Acts of Alabama 1945, p. 731, now carried into the pocket supplement of the 1940 Code of Alabama as Title 48, § 301(31a), see footnote 1, supra, appears the following significant paragraph: 'The provisions of this section shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced.'
>
> Testifying as a witness, the President of the Alabama Public Service Commission admitted that on April 24, 1956, he sent a telegram to the National City Lines of Chicago, of which the Montgomery City Lines, Inc., is a subsidiary, reading as follows:
>
> 'As President of the Alabama Public Service Commission, elected by the people of Alabama, sworn to uphold the segregation laws of this state, which include all forms of public transportation, I hereby defy ruling handed down by the United States Supreme Court ordering desegregation on public carriers. Alabama state law requiring segregation of the races on buses still stands. All public carriers in Alabama are hereby directed to strictly adhere to all present existing segregation laws in our state or suffer the consequences.
>
> /s/ C. C. (Jack) Owen, President,
> Alabama Public Service.'

That telegram was sent without the knowledge or concurrence of the other two Commissioners.

Since the 1945 Act expressly imposes on the Alabama Public Commission the duty of administering and enforcing its requirements as to segregation of the races, and since the President of the Commission has acted so positively and affirmatively to that end, the motion to dismiss the action as against the members of the Alabama Public Service Commission should be and the same is hereby denied.

2. The basic question in this case is whether the statute and ordinance in question can be upheld as valid and constitutional enactments under the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537. It is true, of course, that this Court has not specifically overruled *Plessy* v. *Ferguson* in respect to intrastate commerce, but the Court has so defined and interpreted equal protection and due process in other areas as to make it evident that *Plessy* v. *Ferguson* is no longer controlling. This Court has struck down racial discrimination and segregation in housing, *Buchanan* v. *Warley*, 245 U. S. 60; *Shelley* v. *Kraemer*, 334 U. S. 1; in the field of public education, *Brown* v. *Board of Education*, supra; *Bolling* v. *Sharpe*, supra; and in respect to recreational facilities, *Mayor and City of Baltimore* v. *Dawson*, supra; *Holmes* v. *City of Atlanta*, supra. In *Flemming* v. *South Carolina Gas & Electric Co.*, 224 F2d 852 (4th Cir. 1955), the Court of Appeals held, as did the court below, that the separate but equal doctrine was no longer a correct statement of the law and struck down the South Carolina statutes requiring the segregation of the races on public transportation vehicles as violative of the Fourteenth Amendment.

Racial discrimination with respect to the use of common carrier facilities operating in interstate commerce was found to be a violation of Section 3(1) of the Interstate

Commerce Act (Title 49, United States Code). *Henderson* v. *United States,* 339 U. S. 816. More recently the Interstate Commerce Commission has held racial segregation *per se* to be contrary to the requirements of Sections 3(1) and 316 (d) of the Interstate Commerce Act in respect to all common carrier facilities subject to regulation by the Commission. See *National Association for the Advancement of Colored People, et al.* v. *St. Louis-San Francisco Railway Company, et al.,* — I. C. C. —, decided November 7, 1955; *Sarah Keyes* v. *Carolina Coach Co.,* — I. C. C. —, decided November 7, 1955.

While this Court dismissed the appeal in the *Flemming* case, the import of that ruling is somewhat in doubt. Compare Moore, "Commentary on the U. S. Judicial Code," p. 554 and note 114 at pp. 552 and 554 with Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States, § 125. Whatever the correct interpretation of that holding may be, it is submitted that this Court in other decisions has impliedly overruled *Plessy* v. *Ferguson* and that there now remains no rationale in the decisions of this Court upon which a state policy which enforces segregation in public transportation can be sustained.

Conclusion

Wherefore, it is respectfully submitted that the decision of the court below should be affirmed.

Robert L. Carter,
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Fred D. Gray,
Charles D. Langford,
Attorneys for Appellees.

Dated September 20, 1956.